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Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

W.W. MIMS, INDIVIDUALLY AND
d/b/a THE EDGEFIELD ADVERTISER,

Petitioner,

vs.

EDGEFIELD COUNTY COMMUNICATIONS, INC.,
FOR THEMSELVES AND d/b/a THE CITIZENS
NEWS AND BETTIS RAINSFORD,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT
PETITION FOR WRIT OF CERTIORARI

W. W. MIMS
Pro se
P. O. Box 628
Edgefield, S. C. 29824
803-637-3542

11 pp

EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

1. PLAINTIFF, DUE TO DIRE ECONOMIC CIRCUMSTANCES, HAD TO FIRE HIS COUNSEL AND BECAME PRO SE, TWO MONTHS PRIOR TO TRIAL. UPON LOSS OF HIS COUNSEL, HE LOST MOST OF HIS WITNESSES, INCLUDING HIS EXPERT WITNESS. HE MOVED FOR AN ORDER OF CONTINUANCE AND ALSO TO SUSPEND A PREVIOUSLY AGREED UPON (BY COUNSEL) SCHEDULING ORDER AND WAS DENIED BOTH. THE COURT SET A TIME FOR A MOTION FOR SUMMARY JUDGMENT BY THE DEFENDANTS ALLOWING PLAINTIFF LESS THAN FOUR DAYS TO RESPOND. THE QUESTION IS WHETHER IT IS REVERSABLE ERROR TO DENY A PRO SE LITIGANT LESS THAN THE FULL TIME TO RESPOND TO A MOTION FOR SUMMARY JUDGMENT.

2. WHETHER THE TRIAL JUDGE CAN GRANT A

MOTION FOR SUMMARY JUDGMENT IN A COMPLEX ANTI-TRUST CASE INVOLVING A PRO SE PLAINTIFF UNDER THE CIRCUMSTANCES WHERE THERE APPEARS TO BE A GENUINE DISPUTE AS TO ALL FACTUAL ISSUES BEFORE THE COURT WHERE THE TRIAL JUDGE HAD FAILED TO ALLOW A PRO SE PLAINTIFF A CONTINUANCE TO REVIVE HIS CASE AFTER LOSING HIS COUNSEL AND HIS WITNESSES THUS PRESENTING A PAUCITY OF EVIDENCE ON THE RECORD.

LIST OF PARTIES

ALL PARTIES ARE LISTED IN THE CAPTION.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is unreported and is printed in Appendix A hereto, infra, page A1. The judgment of United States District Court of South Carolina is printed in Appendix A hereto infra, page A8.

JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit was entered on July 11, 1986. A timely petition for rehearing was denied on August 15, 1986. (Appendix A infra, Page). The jurisdiction of this court is invoked under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

Title 15 U.S.C., Section 1 ET SEQ.

Every contract in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal:...

Section 2

Every person who shall monopolize or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states or with foreign nations shall be deemed guilty of a felony,...

Section 15

Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of

the United States in the district in which the defendant resides or is found or has an agent without respect to the amount in controversy and shall recover threefold the damages by him sustained and the cost of suit including a reasonable attorney's fee.

Section 18

No corporation engaged in commerce shall acquire directly or indirectly the whole or any part of the stock or other share capital and no corporation subject to the jurisdictiion of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce where in any line of commerce in any section of the country. The effect of such acquisition may be substaantially to lessen competition or tend to create a monopoly.

STATEMENT OF CASE

This is a private anti-trust action seeking treble damages and injunctive relief for injuries and threaatened and continuing injuries to business properties and trade brought under the Sherman and Clayton act, specifically sections 1,2, and 4 of the Sherman Act, 15 U.S.C. Sections 1,2,4 and Sections 4,7 and 16 of the Clayton act, 15 USC Sections 15, 18 and 26.

Plaintiff filed his action on November 11, 1984, and Defendants filed their Answers on January 28, 1985. On April 30, 1985, Plaintiff (mims) filed a letter requesting to proceed pro se.

On May 1, 1985, upon oral motion, Mims was allowed to proceed pro se and an oral order to relieve all counsel of record for Mims was granted and the case was set

for jury trial for July 1985 term of court. On May 10, 1985, Plaintiff filed an expert witness list with the Court. On May 17, 1985, Plaintiff filed a Motion to continue the trial beyond the July term of Court. At the Motions Hearing on May 29, 1985, Plaintiff was given until June 3, 1985, to produce new expert witness. On the same date Plaintiff's Motion to continue case was denied. On June 10, 1985, Plaintiff filed Motion to Eliminate Previously Agreed Upon Scheduling Order. On June 17 the Court set a date for which Defendants could file their Motion for Summary Judgment which was June 26, 1985, and also, set the time for Plaintiff to respond to Defendants' Motion for Summary Judgment as July 1, 1985. July 2, 1985, was set6 as the date for hearing the Motion for Summary Judgment.

On June 17, 1985, Plaintiff's Motion to Eliminate Previously Agreed Upon Scheduling Order was denied. On June 21, 1985, Plaintiff filed Motion to Add Another Lay Witness. On June 26, 1985, Defendant filed Motion for Summary Judgment.

On July 2, 1985, a notice of appearance was filed for Thomas A. Mims as Counsel of Record for Plaintiff. On the same date Plaintiff filed Responsive Memorandum and affidavits to Defendants' Motion for Summary Judgment which Motion was heard on that same day.

An order granting Motion for Summary Judgment was handed down and filed on July 2, 1985. On August 9, 1985, a final Order in the form of a written opinion granting Summary Judgment for Defendants' was filed.

Plaintiff (Mims) has alleged that the

Defendants, namely Edgefield County Communications, Inc. (ECC,Inc.), a corporation owning all of the assets of The Citizen News and Bettis C. Rainsford, a principal stockholder, have violated Section 7 of the Clayton Act, 15 U.S.C. Section 18, resulting in economic damage to himself and his newspaper, including loss of income, goodwill; that further he has been prohibited from rebuilding his newspaper due to ECC, Inc's and Rainsford's acts. The particular acts of which Plaintiff complains are that ECC, Inc., acting under direction of Rainsford merged three (3) competitive weekly newspapers in the County of Edgefield, namely, The Ridge Citizen formed originally in 1949, The Edgefield County News formed originally in 1972 and The County Press formed originally in 1977. That all of the newspapers were engaged

in interstate commerce.

The (3) newspapers competed within the weekly newspaper market until the merger, which occurred on April 29, 1982, at which time they combined to form The Citizen News which obtained the goodwill and mailing list of the three (3) newspapers.

Mims' newspaper, The Edgefield Advertiser, is one hundred and fifty (150) years old and does business as a sole proprietorship. It is a weekly newspaper edited and published in the County of Edgefield by Mims and was the fourth weekly newspaper in a county of Seventeen Thousand (17,000) people until the merger of the other three (3) newspapers. There are now two (2) newspapers, that of the Defendant and that of the Plaintiff.

In 1971 The Edgefield Advertiser and The Ridge Citizen were the only two (2) newspapers published in Edgefield County. The Edgefield Advertiser was published in the town of Edgefield and The Ridge Citizen was published in the town of Johnston about eight (8)) miles away. The two (2) newspapers sold about the same amount of advertising and the total circulation of The Edgefield Advertiser was about Fifteen Hundred (1,500) in 1972.

Since the merger in 1982 The Citizen News carries over ninety percent (90%) of the advertisements in weekly newspapers in Edgefield County and The Edgefield Advertiser carries less than ten percent (10%) of the advertising. The Edgefield Advertiser has a circulation of approximately five hundred (500) and The Citizen News a circulation of four

thousand (4,000).

Plaintiff has expended large sums of money to rebuild his newspaper since being awarded a substantial sum of money in 1978 by a jury verdict. His newspaper had been destroyed by an illegal boycott in 1972. Plaintiff alleges that the effect of the merger prohibited him from rebuilding his paper since the boycott. The merger has the effect of lessening competition and creating a monopoly in the market, line of commerce, or activities consisting of weekly newspapers in Edgefield County. He alleges that the town of Johnston and the town of Edgefield consist of geographic sub-markets.

Mims also alleges that the actions of ECC, Inc., and Rainsford were executed to force his newspaper out of business of publishing The Edgefield Advertiser so as

to establish The Citizen News as the sole weekly newspaper in Edgefield County. That the acts of Defendants, the merger, etc., have resulted in their having substantial market power and there is dangerous probability that they will achieve monopoly power if they have not already done so, constituting an attempt to monopolize in violation of Section 2 of the Sherman Act further damaging Mims.

Mims further alleges that the Defendants and others have engaged in concerted activity lessening activity and restraining trade in violation of Section 1 of the Sherman Act.

Mims has invoked the South Carolina Unfair Trade Practices Act,, SC Code Section 35-2-20, alleging that the acts of Defendants have violated that South Carolina Act and that ECc, Inc., and Rainsford have interfered with Mims'

contractual relationships.

Plaintiff retained the law firms of Andrew Krulwich from Washington, D. C., and Fred Gertz of Columbia, South Carolina, to assist him in prosecuting this action. These law firms represented him until May 1, 1985. Plaintiff filed a Motion with the Court to proceed pro se which was allowed by order of the Court on May 1, 1985 (App. Vol. I, p.40). At this time Mims' counsel were relieved as counsel in this case. Shortly thereafter Mims filed a motion to suspend the Scheduling Order pursuant to Federal Rules of Civil Procedure 16(b), as amended, or modified, by local District Court rule excluding certain cases from its application which includes the cases in which all plaintiffs are unrepresented by an attorney. This motion was denied.

At about the same time, Mims, having

lost his expert witness, and one or more of his lay witnesses, moved to continue his case beyond the July term of Court to allow him to undertake further discovery and to obtain more witnesses, which motion was denied.

In regard to the Motion for Summary Judgment, Plaintiff contends that:

1. Due to the fact that he was not represented by counsel, the complexity of the case and the fact that he lost his witnesses, he did not have time to prepare for the jury trial or the lMoption for Summary Judgment by the July 2nd deadline.

2. That he was not given ten (10) days to respond to the Motion for Summary Judgment as provided by Federal Rules of Civil Procedure, Rule 56(c). Plaintiff also suffers physical disability of poor hearing.

He further contends that the trial judge erred in that Order for Summary Judgment in that there was a genuine issue as to all material facts that form his case. That there does exist the fact of damages in that Plaintiff lost income and profits and assets of his newspaper from the merger; that his affidavit and that of his expert witness clearly set out the weekly newspaper as a relevant product market; that the merger giving ninety percent (90%) of the advertising to Defendants and leaving him with less than ten percent (10%) created a monopoly; and that Defendants, who have the burden of proving the failing company defense, failed to prove that The Ridge Citizen was a failing company.

Defendants' Answer and Counterclaim is that Mims' newspaper was destroyed by a boycott that occurred in 1972 and that

Mims was the sole cause of his newspaper's failure to recover. That the other three (3) newspapers were failing and that necessity required the merger to effect an economically viable newspaper that would serve the County and the region.

The District Judge reasoned that the Plaintiff had produced no evidence that he suffered anti-trust injury; that he failed to produce sufficient evidence delineating the relative product market; that he failed to produce significant probative evidence that the Defendants significantly lessened competition and that the failing company defense applies.

He reasoned that the anti-trust laws were not intended to vindicate an injury of the type that Mims complains of, i.e., if the three (3) newspapers had been allowed to go out of business there would

be less competition and Mims could recover, noting that the Plaintiff would have suffered the same losses even if the failing newspapers had been acquired by someone other than the Defendant. He reasons that Mims has conceded that his newspaper's failure was due to a prior boycott and poor management.

He further reasons that there are many alternatives to weekly newspapers such as shoppers' guides and daily newspapers and broadcasting media and that the absence of a market measure alone entitles the Defendant to a Summary Judgment.

That further the Defendants have produced much evidence that they face competition not contradicted by the Plaintiff. Therefore, the merger has not lessened competition.

The District Judge reasoned that the three (3) acquired newspapers were

failing and this came within the failing company defense.

The District Court therefore adjudicated all claims by the Plaintiff against the Defendants in this case by granting Summary Judgment in favor of Defendants Rainsford and ECC, Inc.

REASONS FOR GRANTING WRIT

During the time when the Plaintiff was represented by counsel, the trial court had issued a Scheduling Order. Later on May 1, 1985, the Plaintiff proceeded to act pro se in this litigation. When he lost his counsel, he also lost his only expert witnesses and other important witnesses. He, also, at about the same time moved for a continuance so that he might obtain new witnesses and proceed toward additional discovery as noted above. Federal Rules of Civil Procedure

16(b) provides that a Scheduling Order is required "except in categories of actions exempted by district rule as inappropriate...." The United States District Court for the District of South Carolina has specified as inappropriate for Rule 16(b) treatment thirteen categories of cases including "cases in which all plaintiffs are unrepresented by an attorney" local rule 19. Thus if the present case had originated as a pro se case it would have been exempted from the requirement of a Scheduling Order.

The trial court, even though made aware of the difficulties of the Plaintiff as set out above denied both motions for a continuance and to eliminate the Scheduling Order. As a matter of fact, the trial judge not only denied his motions but cut short the time when the Plaintiff had to respond to the

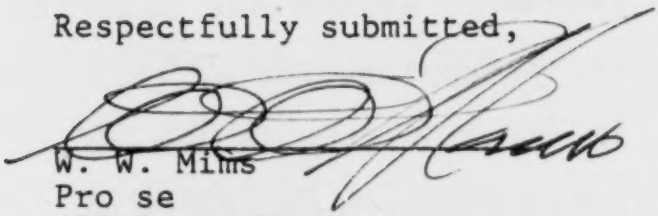
Defendants motion for Summary Judgment, thus compounding the distressful situation of the Plaintiff. The motion for Summary Judgment which contained voluminous exhibits, affidavits and case citations in the memorandum of law comprising four volumes was served on Thursday, June 27, 1985, and Plaintiff was required to respond by Monday, July 1, 1985. Thus Plaintiff had less than the ten-day period to respond to the Motion for Summary Judgment. Plaintiff was literally squeezed out of court, due to no fault of his own. There seem to be no clear-cut rule through out the district courts and circuits so as to clearly define to a litigant whether he may expect to be able to take advantage of the ten-day notice or not. It would behoove this Court to clarify this very important procedural aspect of the law.

There is an obvious need for uniformity in the application of this rule.

Additionally in regard to the second question presented, under the circumstances, as outlined above, it follows, that, since the Plaintiff lost his counsel and was denied an important continuance so he could further discovery with new witnesses that the record would reveal a paucity of evidence to be presented to the lower court and later to the apeals court on substantive matters. This coupled with the fact that the Plaintiff had approximately three and one-half days to prepare his response to the Motion for Summary Judgment placed him in an impossible and unfair position within which to have his day in Court.

Therefore, the Plaintiff prays that a Writ of Certiorari be granted.

Respectfully submitted,



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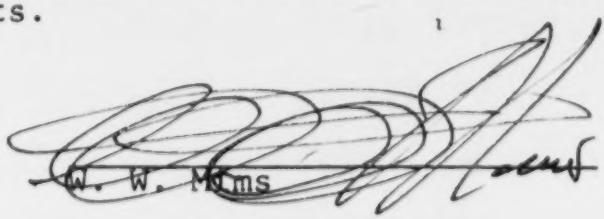
C E R T I F I C A T E

I certify that I have served (40) corrected copies of the foregoing Petition For Writ of Certiorari with the United States Supreme Court by mailing said copies by U. S. Mail deposited postage paid addressed to: Supreme Court of the United States (Clerks, Reporter of Decisions, Marshall, and Librarian), 1 First Street, N.E., Washington,D.C. 20543.

This 2nd day of December, 1986 and three (3) corrected copies have been similarly mailed to Mr. Henry Parr, Jr., 44 East Camperdown Way, Greenville, S.C. 29603, Attorney for Respondents.



W. W. Mims

A P P E N D I X

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1890

W. W. Mims, individually
and d/b/a The Edgefield Advertiser
Appellant,

vs.

Edgefield County Communication,
Inc., et al, for themselves and
d/b/a The Edgefield County and
Ridge Citizen News,
Appellee,

and

J. Luther Aull, individually and
d/b/a The Edgefield County Ridge
Citizen, The Edgefield County News,
Inc., and Emily L. Bull, d/b/a The
Edgefield County Press.
Defendants,

and

Bettis Rainsford,
Appellee

Appeal from the United States District Court of South Carolina, at Greenwood. G. Ross Anderson, Jr., District Judge. (C/A 84-2740)

Argued: January 9, 1986
Decided: July 11, 1986

Before WIDENER and ERVIN, Circuit Judges, and MICHAEL, United States District Judge for the Western District of Virginia, sitting by designation.

Thomas A. Mims for Appellant; Henry L. Parr, Jr. (Frank S. Holleman, III; Wyche, Burgess, Freeman & Parham, P.A. on brief) for Appellees.

PER CURIAM;

In this case, the plaintiff-appellant, proceeding pro se, challenges a grant of summary judgment for the defendants on an asserted private antitrust set of claims.

The issues presented by the appellant in this case are the following: (1) whether the district court erred by not allowing the plaintiff to continue the case beyond the July 2 term of court; (2) whether the district judge erred by not allowing plaintiff's motion to suspend the scheduling order to allow the plaintiff further discovery and to add more witnesses; (3) whether the district judge erred by requiring the plaintiff to respond less than ten days from the filing of the motion of summary judgment; (4) whether the district judge erred by granting defendant's motion for summary

judgment.

In dealing with the first issue presented for review, namely, whether the district judge erred by not allowing plaintiff to continue the case beyond the July 2 term of court, a cursory review of the record below shows that it is replete with extensions, modifications of the scheduling order, etc., revealing rather clearly that, whenever the plaintiff presented a facially valid reason for making a change in schedule, etc., the court below granted that change. Such questions are committed to the discretion of the court. Finding no abuse of discretion here, the refusal of the district judge to continue the case in this final instance does not amount to error.

In considering whether the district judge erred by not allowing plaintiff's

motion to suspend the scheduling order to allow plaintiff further discovery and to add more witnesses, one sees from the record that the district court had previously amended its scheduling order, the plaintiff had failed to comply with the amended scheduling order, and the plaintiff's expert initially designated by him had indicated that he would not testify for the plaintiff. The record does not disclose either any basis for or the identity of additional witnesses. Again, such matters are committed to the discretion of the court. There being no abuse of discretion shown, the court did not err in this respect.

In determining whether the district judge erred by requiring plaintiff to respond less than ten days from the

filing of the motion for summary judgment, this court must consider the time restrictiions confronting the district judge. He was faced with a trial date which required that the motion for summary judgment be acted on and disposed of under the established schedule. In fact, by that time, the plaintiff had engaged the services of his attorney-son in representing him at the hearing on the motion for summary judgment, and there was no request made by the plaintiff or by his counsel for any change or extension in the schedule for filing a response and arguing the motion. The record reveals clearly that counsel for the plaintiff had come into the case formally only several days before the argument on the motion for summary judgment, though counsel

indicated that he had "assisted" the plaintiff, apparently on an informal basis, on occasions before he came formally into the case. Nonetheless, counsel made no request for any change of any sort, but rather presented the plaintiff's argument, supported by affidavits, etc., in opposition to the motion for summary judgment. This court finds no error in the failure of the lower court to continue the hearing sua sponte.

In dealing with the fourth issue presented for review, the record reveals that the court below conducted an exhaustive review of the evidence and found that (1) the plaintiff had presented no evidence which would support a conclusion as to an anti-trust injury; (2) that the plaintiff had failed to

support his contention as to the relevant product market; (3) that the plaintiff had failed to produce satisfactory evidence that the defendants had lessened the competition in any relevant product market; (4) and that the challenged acquisitions fell with the "failing company" defense, as set out in Brunswick Corp. v. Peublo Bow-o-Mat, Ind., 429 U.S. 477 (1977).

This court recognizes the caution required in the granting of summary judgment in anti-trust cases. See Poller v. Columbia Broadcasting Systems, Inc., 368 U.S. 464, 473 (1962). In Morrison v. Nissan Motor Co., Ltd., 601 F2d 139 (4th Cir. 1979) this court stated the matter in the following language:

> [W]hen the dispostion of a case turns on a determination of

> intent, courts must be especially cautious in granting summary judgment....Since in anti-trust cases "motive and intent play leading roles," these rules take on added importance in that context....This, however is not to suggest that Rule 56 is to be "read out of anti-trust cases"....

601 F.2d at 141-142 (citations omitted). Acknowledging the guidance of these cases, this court is likewise aware of the fact that summary judgment remains "an appropriate procedure in anti-trust litigation." See Terry's Floor Fashions, Inc., v. Burlington Industries, Inc., 763 F.2d 604, 610 (4th Cir. 1985).

After detailed consideration of the various errors assigned, the briefs and arguments of counsel, and a careful review of the voluminous record in this case, the court concludes that the granting of summary judgment was proper, as exemplified in the comprehensive and careful opinion of the district court below.

For the reasons asserted in the opinion of the court below, the holding of that court as to the summary judgment question is affirmed.

Because the court below expressly found that its determination of a motion for summary judgment was a final order, the appeal proceeded only on that aspect of the case, leaving for future resolution certain counterclaims interposed in the case, and the question

of potential sanctions against the plaintiff. Because these issues remain unresolved, the case is remanded to the United States district court for such further actiion as to the remaining issues in the case as may be appropriate.

AFFIRMED AND REMANDED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
Greenwood Division

W. W. Mims, individually and d/b/a The Edgefield Advertiser,	)
Plaintiff,	)
vs.	)
Edgefield County Communications, Inc., et al.,	)
Defendants.	)

C.A. No.9:84-2740-3

ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS RAINSFORD AND EDGEFIELD COUNTY COMMUNICATIONS, INC.

The plaintiff ,Mr. Mims, brought this lawsuit against defendants, Edgefield County Communications, Inc. ("ECC, Inc.") and its president, Bettis Rainsford ("Rainsford"), as well as other defendants alleging violations of Sections 1 and 2 of the Sherman Act,

Section 7 of the Clayton Act, and the South Carolina Unfair Trade Practices Actk ("UTPA") as well as a claim of intentional interference with contractual relations based on state law. The plaintiff contends that the defendants violated both the antitrust laws and the

UTPA as a result of acquisitions by defendant ECC, Inc. during 1982 or certain assets of three newspapers published in Edgefield County, South Carolina. After completion of

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[1] Initially Kalmia Press, Inc., The Edgefield County News, Inc., and J. Luther Aull were defendants in this action along with Rainsford and ECC, Inc. The plaintiff later moved to dismiss the claims against defendants Kalmia Press

and Edgefield County News, Inc., and those claims were dismissed with prejudice by order of this Court dated June 3, 1985. At the end of discovery defendant Aull moved for summary judgment along with defendants Rainsford and ECC, Inc. Plaintiff's counsel then acknowledged that the plaintiff lacked sufficient evidence to substantiate the claims against defendant Aull, and those claims were dismissed with prejudice by order of the Court.

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discovery, defendants Rainsford and ECC, Inc. moved for summary judgment in their favor. For the reasons expressed below, the Court hereby grants the motion for summary judgment.[2]

Many of the basic facts are

undisputed. The plaintiff, Mr. Mims, publishes a weekly newspaper, The Edgefield Advertiser ("Advertiser"), in Edgefield, South Carolina. A number of other newspapers also circulate in Edgefield and Edgefield County. They include The Citizen News, a weekly

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[2] This order replaces the previous memorandum order of this Court which granted summary judgment in favor of defendants Rainsford and ECC, Inc. and stated that a full opinion would be entered at a later date.

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newspaper published by defendant, ECC, Inc., The Aiken Standard, a five-day-a-week paper, The Greenwood Index Journal, The Saluda Sentinel, a weekly paper, The State, The Augusta Chronicle, The Herald,

The Greenville News, and The McCormick Messenger, a weekly paper. (Mims 3/28 Tr. p. 256, line 15 to p. 257, line 4). The Augusta Chronicle has a weekly section, "Carolina Extra",, containing news of special interest to people in Edgefield and Aiken Counties (Skinner Affidavit Para.3). The "Carolina Extra" is distributed in Eedgefield County each Thursday morning. The Aiken Standard is distributed free to households in Edgefield and the town of Johnston in Edgefield County each Wednesday. (Cothran aff. at Para.5)..

In addition to these newspapers, a shopper publication entitled "I Wanta", radio, television, cable television, various forms of direct mail, and billboards deliver information to people in Edgefield County. (Aull aff. Para.7,

Bull aff. Para.7, Casey aff. Paras.3 and 4, Cothran aff. Para.6, Jackson aff. Para.5, McLean aff. Paras.3 and 4, Rainsford aff. Para.7).

Prior to 1982, The Citizen News did not exist, and there were three other papers with circulation in Edgefield County, The Edgefield County Press ("County News"), and The Ridge Citizen In 1982 each of those three papers faced serious financial problems. Emily Bull, the publisher of the County Press, had exhausted her financial resources, was unable to continue to publish the paper for any significant length of time, and wished to leave Edgefield since she had separated from her husband. (Bull aff. Para.8). The County Press had never made a profit since Bull established it in 1977. (Bull aff. at Para.8). Amelia D.

Reece, publisher of the County News, had sunk deeper and deeper into debt each year in which she had been publishing that paper (Reece Tr. p.10, lines 1-5). She later gave up her home in an attempt to deal with debts she had incurred while attempting to publish the County News. (Reece Tr. p.12, lines 2-11). The County News had not made a profit since it began in 1972. (Reece Tr. p9, lines 14-24). The debts of The Ridge Citizen which was published by Luther Aull had also been growing for some time. (Aull aff. Para.2). Bull, Reece and Aull had each attempted at various times to sell their respective papers. No sales had resulted (Reece Tr. p.10, lines 8-15; Bull aff. at Para.9; Aull aff. at Para.5).

In early 1982, defendant Rainsford negotiated with Amelia Reece to purchase

the name, subscription list and goodwill of the County News. Rainsford then organized ECC, Inc. which purchased those assets from Amelia Reece. ECC, Inc. then purchased from Luther Aull the name, subscription list and good will of The Ridge Citizen, County News, and County Press and began to publish a new paper, The Citizen News, during 1982.

The plaintiff's paper, The Advertiser, had failed long before 1982. In the early 1970's, The Advertiser had lost substantially all of its advertising and from 80% to 90% of its subscribers as the result of a boycott. (Mims 3//28 Tr. p.25, lines 22-23 p. 29, lines 12-15). By 1977, the value of The Advertiser as a going concern had dropped to zero. It was worth only the resale value of the equipment that it owned. (Sweatt aff.

Para.7). In the years that followed, The Advertiser never recovered from the boycott. (Mims 3/28 Tr. p.36, lines 18-19). It has not made any money since the boycott. (Mims 3/28 Tr. p.25, lines 22-23). Neither defendant Rainsford nor ECC, Inc., however, were responsible for the boycott.

I. ANTITRUST AND UTPA CLAIMS

Although defendants Rainsford and ECC, Inc. were not involved in the boycott which essentially destroyed The Edgefield Advertiser, the plaintiff alleges that ECC, Inc.'s acquisition of assets of The County Press, The County News, and The Ridge Citizen substantially lessened competition, created a monopoly in an alleged market including only weekly newspapers published in Edgefield County, South Carolina, and therefore violated

are statements of opinion and hearsay. The Court agrees that the plaintiff is not entitled to assert matters of opinion because he has not listed himself as an expert witness in accord with the local rules of the Court promulgated pursuant to Fed. R. Civ. P. 16(b), nor does his affidavit indicate that he is qualified to testify as an expert witness. The plaintiff's affidavit is, therefore, inadmissible to the extent that it contains hearsay and matters of opinion.

The defendants challenge the qualifications of Mr. S. Jackson as an expert. His affidavit indicates that he has owned and operated a weekly newspaper for four and one-half years at most. Although he states that he has worked on daily and weekly newspapers in various capacities and has taught college

courses, he does not specify the nature of his prior experience or familiarity with the subject matter on which he attempts to opine in sufficient detail to qualify himself as an expert. S. Jackson's affidavit is therefore inadmissible to the extent that it contains matters of opinion properly asserted only by a qualified expert. Nevertheless, this order shall treat the affidavit as if it were admissible because, even if admitted, the affidavit does not defeat the motions for summary judgment.

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in complex antitrust litigation. ..., summary judgment clearly remains an appropriate procedure in antitrust litigation." Terry's Floor Fashions, Inc. v. Burlington Industries, Inc., No.

83-1687, slip op. at 16 (4th Cir. May 23, 1985). The Supreme Court has made it clear that Rule 56 should not be "read out of antitrust cases." First National Bank of Arizona v. Cities Service Co., f391 U.S. 253, 289, 88 S.Ct. 1575, 1593 (1968). A plaintiff is not entitled to "get to a jury" merely by invoking the antitrust laws and hoping "that something can be developed at trial." Cities Service, supra, 391 U. S. at 290, 88 S.Ct. at 1593 quoted in Universal Lite Distributors v. Northwest Industries, 452 F. Supp. 1206, 1210(d.Md. 1978), aff'd in 602 F.2d 1173 (4rth Cir. 1979).

Summary judgment is "appropriate where the court, viewing the record as a whole in the light most favorable to the non-movant, determines that there exists no genuine issue of material fact." Terry's

Floor Fashions, supra, at 16. Once the defendants have produced evidence refuting the plaintiff's allegations, the plaintiff must produce "significant probative evidence" establishing his claim. Cities Service, supra, 391 U.S. at 290, 88 S.Ct. at 1593; Terry's Floor Fashions, supra, 16. Under these principles, the defendants are entitled to summary judgment on four separate grounds[6] which are discussed more fully below:

(A) the plaintiff has failed to produce any evidence that he has suffered antitrust injury as a result of the challenged acquisitions.

(B) the plaintiff has failed to produce sufficient evidence delineating the relevant product market;

(C) the plaintiff has failed to

produce significant probative evidence that the defendants have significantly lessened competition in any relevant product market; and

(D) the challenged acquisitions fall within the failing company defense.[7]

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[6] Plaintiff's Para.1 Sherman Act claim also fails because plaintiff's claims of conspiracy against all the defendants except Rainsform and ECC, Inc. have been dismissed with prejudice. Plaintiff is no longer free to contend that anyone other than Rainsford and ECC, Inc. were involved in a conspiracy. It is well settled that the president of a company, like Rainsford, cannot be accused of conspiracy with his own corporation, Kendall Elevator Co., Inc. v. LBC&W Ass'n of South Carolina, Inc., 350 F. Supp. 75,

78 (D.S.C. 1972) (Chapman D. J.).

[7]The plaintiff's claim under the UTPA fails for the same reason as the plaintiff's antitrust claims. As pleaded in the complaint, the UTPA claim is essentially a restatement of the federal antitrust claims. The plaintiff has not set forth or suggested in his pleadings or arguments any theory of recovery under the UTPA which is different from the theory of the federal claims. Under these circumstances the UTPA claim falls with the antitrust claims. S. C. Code Ann. S.39-5-20 instructs the courts to look to federal law for guidance in applying the UTPA. The deficiencies which are basic to the plaintiff's federal antitrust claims are also basic to his UTPA claim.

A. Antitrust Injury

Without evidence of actual or threatened antitrust injury, a private person may not bring an antitrust or UTPA claim. See Terry's Floor Fashions v. Burlington Industries, No. 83-1687, slip op. at 16 (4th Cir. May 23, 1985); Stearns v. Genrad, Inc., 752 F.2d 942, 945 (4th Cir. 1984) ("A violation has occasioned an antitrust injury."); Advanced Business Systems and Supply Co. v. SCM Corp., 287 F. Supp. 143 (D.Md. 1986), aff'd, 415 F.2d 55, 63 (4th Cir. 1969), cert. denied 397 U.S. 920 (1970) (showing of harm is "prerequisite to a private antitrust action"). Section 4 of the Clayton Act, 15 U.S.C. Para. 15, requires that a plaintiff show injury "to his business or property by reason of" a violation of the antitrust laws. Section

16 of the Clayton Act, 15 U.S.C. Para. 26 requires a showing of a significant threat of injury from an antitrust violation. Similarly, in order to maintain a private action under the UTPA, one must have suffered "ascertainable loss of money or property as a result of" the alleged violation." S..C. Code Ann. Para 39-5-140(a).

The plaintiff asserts that he has been injured because, but for the challenge acquisitions, he would no longer face competition from two of the newspapers whose assets were sold. In his deposition he speculated that had ECC, Inc. not acquired the failing papers, he would have regained what he believes to have been his own "natural monopoly." (W. W. Mims 3/28 Tr. at p. 110, line 18 to p. 11, line 13). He said "if I might

have been fortunate enough to have seen the decease of these two newspapers [the County News and County Press] as normally newspapers would" when they lack "revenue to pay", "pride", and "conviction... I was in a position to get started again and be the Edgefield trading zone newspaper." (Mims 3/28 Tr. p. 111, lines 2-10). Neither the antitrust laws nor the UTPA, however, were intended to vindicate this type of injury.

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 97 S.Ct. 690 (1977), demonstrates the insufficiency of the plaintiff's claim of injury. In Brunswick, the plaintiff complained about the defendant's acquisition of several failing bowling lanes. 429 U.S. at 479-481, 97 S.Ct. 692-693. The plaintiff claimed that the acquisitions had

violated the antitrust laws and damaged the plaintiff because the plaintiff's own bowling lanes would have made more money if the failing lanes had been allowed to close. 429 U.S. at 481, 97 S.Ct. at 694.

The Court rejected the Brunswick plaintiff's claim and held that the plaintiff was not entitled to recover "windfall profits" even if the acquisitions had been unlawful. 429 U.S. at 488, 97 S.Ct. at 697. The Court noted that the plaintiff would have suffered the same losses even if the failing lanes had been acquired by someone else. 429 U.S. at 487, 97 S.Ct. at 697. The plaintiff's losses did not result from anything which "the antitrust laws were intended to prevent." 429 U.S. at 489, 97 S.Ct. at 697. The Court ruled, therefore, that the defendant in

Brunswick was entitled to judgment notwithstanding the jury's verdict.

Mr. Mims' claim suffered the same defect as those of the plaintiff in Brunswick. Mr. Mims has provided no evidence that he is worse off than he would have been had the County News and County Press been acquired by someone other than ECC, Inc. In fact, he has not provided any evidence suggesting that he would have made any more money if the papers had been allowed to go out of business. In any event, Mr. Mims is not entitled to complain that he continues to face competition because the papers were acquired rather than being allowed to go out of business or fall into his hands. The antitrust laws protect "competition," not "competitors." Brunswick, 429 U.S. at 488, 97 S.Ct. at 697.

Indeed, this is "one of those cases, not unfamiliar in treble damage litigation, where injury resulting from normal business hazards is sought to be made redressable by casting the affair in antitrust terms." Poller v. Columbia Broadcasting System, 368 U.S. 464, 474, 82 S.Ct. 486, 491 (1962) (Harlan J. dissenting) quoted in Universal Lite, supra, 452 F. Supp. at 1211, afff'd 602 F.2d 1173 (4th Cir. 1979). The defendants have submitted a great volume of detailed evidence showing that the continued failure of the plaintiff's newspaper is not the result of anything the defendants have done or that the antitrust laws prohibit. The plaintiff has not even attempted to contradict most of this evidence and has, in effect, conceded that the failure of his paper is

due to the boycott and to poor management on his part rather than the acquisitions which he challenges or anything the defendants have done.

In his deposition, Mr. Mims repeatedly blamed the continued failure of his paper on the boycott. He testified that the boycott deprived him of his paper's advertisers (Mims 3/28 Tr. at p. 25, line 22 to p.26, line 17; p. 28, lines 1-22; p.60, line 9 to p.63, line 5; p. 67, line 24 to p. 68, line 8) and subscribers (Mims 3/28 Tr. p.29, lines 12-30), that it alone prevented him from obtaining a staff (Mims 3/28 Tr. at p. 60, line 9 to p. 63, line 5) and that he could not rebuild the paper without a staff.)Mims 3/28 Tr. at p. 63, lines 3-5; p. 72, lines 17-25). When asked why he could not retain an adequate staff, he replied,

"I can't think of anything except the boycott situation," (Mims 3/28 Tr. at p. 62, lines 22-23) and asserted that it was "impossible" to rebuild the paper without a staff. (Mims 3/28 Tr. at p.63, lines 3-5).

Mims also asserts that he has been unable to rebuild his paper because there are fewer opportunities to sell advertising since the boycott, that the boycott generally disrupted business life in Edgefield (Mims 3/28 Tr. at p.71, line 17 to p. 72, line 5), that he has made no progress in recovering from the boycott (Mims 3/28 Tr. p. 34, line 16 to p. 36, line 20), and that a "ghostly psychological influence" of the boycott remains to defeat the Advertiser's recovery from the boycott (Mims 3/28 Tr. at p.70, lines 14-17).

The plaintiff's wife agrees. She affirmed her husband's assertion that the boycott has been the primary reason for the Advertiser's problems. (Mrs. Mims Tr. at p. 33, lines 22-24).

Neither defendant Rainsford nor ECC, Inc. can be blamed for the boycott of The Edgefield Advertiser. ECC, Inc. did not even exist at the time of the boycott, and Mr. Mims has admitted that defendant Rainsford was not involved. (Mims 3/28 Tr. at p. 55, lines 22-25).

In addition to blaming the boycott for his paper's failure, Mr. Mims attributes the failure to a lack of staff. (Mims, 3/28 Tr. p. 30, lines 23-25; p. 57, lines 12-21; p. 64, lines 19-21; p. 63, lines 3-5). He contends that the defendants entered contracts with all potential staff members and prevented him from

obtaining a staff. The plaintiff, however, does not offer any significant probative evidence to support this contention. The plaintiff points to only one person, Sandra Friar, who wished to work for the plaintiff's paper and was prevented from doing so by a contract with ECC, Inc.

On the other hadn, the plaintiff does not contradict evidence submitted by the defendants showing that there were potential staff members living in Edgefield County whom the plaintiff failed to attempt to recruit. Among them was Frances Miller, who had once written a popular column for the plaintiff's paper and had been his "chief correspondent." She was unemployed in Edgefield County from 1981 to 1984, but the plaintiff did not offer her a job.

(W. W. Mims 5/16 Tr. p. 18, line 8 to p. 19, line 21; p. 22, line 14 to p. 24, line 6; Miller aff. at Paras. 5, 6). The plaintiff admits that he "valued the work of Mrs. Miller highly" but did not seek to reemploy her because he was not aware that she might consider employment. He acknowledges, however, that she has now agreed to work for The Citizen News. (W. W. Mims aff. at Para. 14a).

Other potential staff members whom the plaintiff failed to recruit include Carlee McClendon, David Parker, Hendrick Booraem and perhaps others. Carlee McClendon had a degree in journalism, had previosuly worked for The Advertiser, and was living in Edgefield County from 1978 to 1982, but the plaintiff did not seek to employ him. (Rainsford aff. at Para 3; W. W. Mims 5/16 Tr. at p. 24, line 7

to p. 25, line 15). David Parker, a current employee of The advertiser and a former employee of The Citizen News, was unemployed for over seven months. Plaintiff's own paper noted the absence of articles by Parker from the Citizen News (See Exhibit GG to defendants' Memorandum in Support of Motion for Summary Judgment, "Here and There", The Edgefield Advertiser, August 22, 1984, p. 4); but plaintiff did not attempt to recruit him. Initially the plaintiff stated that he was "not interested" in trying to employ Parker. (W. W. Mims 3/28 at p. 174 line 3) Plaintiff gave Parker a job only after Parker stated in his deposition in this lawsuit that he would like to work for The Advertiser. (Rainsford aff. at Para. 4; W. W. Mims 3/28 Tr. at p. 172, lines 8-10, line 24

to p. 174, line 4; Parker Tr. at p. 49, line 19 to p. 50, line 2).

Hendrick Booraem had a Ph.D in history, needed employment, had written a few articles for The Ridge Citizen, and would have been delighted to work for The Edgefield Advedrtiser, but the plaintiff never approached him. (Booraem aff. at Paras 2,3 and 4). Although the plaintiff insists that he was not aware that Mr. Booraem was available, the plaintiff do not deny that The Ridge Citizen carri articles by Mr. Booraem and that t plaintiff would have been aware of Mr. Booraem and he read the other local newspapers in Edgefield County. (W. W. Mims aff. at p. 3-4, Paras 2a, 2b and 2c) The plaintiff also asserts that he would not have approached Mr. Booraem even if he had known of him because the plaintiff

did not believe it to be "a proper considerate act" to solicit those who contributed to other papers. (W. W. Mims aff. at Para. 3c.) The plaintiff cannot blame the defendants for his reluctance to recruit writers from other papers.

The plaintiff did not even advertise in local papers to determine what potential staff members were available. (W. W. Mims 5/16 Tr. p. 36, line 1 to p. 38, line 10) He conceded in his deposition that he did not know who the qualified potential staff members in the area might be. Yet he simply assumed that they would know of his needs and come to him. (W. W. Mims 5/16 Tr. at p. 16, line 20 to p. 17, line 15).

The plaintiff also concedes that he did not request assistance from Professor

Mims 5/16 Tr. at p. 41, lines 19-23). Although plaintiff believes that the graduates of the School of Journalism would not have been interested in his paper, he concedes that he "would have been most pleased to have had the assistance of the College of Journalism." (W. W. Mims aff. at p. 10, Para. 7a). He insists further that he hoped that some relationship with the School of Journalism and its students might have developed.

Plaintiff offers no explanation as to his failure to request the assistance of the South Carolina Press Association, which fills between 50 and 60 staff positions in South Carolina newspapers each year and offers free want-ads in its newsletter to papers which have staff openings. (Montgomery aff. at Paras. 14

and 15). Plaintiff does not contnest the affidavit of Dr. Montgomery, the Secretary-Manager of the Association, who states that he cannot recall ever failing to fill a staff position on which assistance was requested and that he would have been happy to assist Mr. Mims. (Montgomery aff., Paras. 14, 15, and 16).

Plaintiff offers no evidence suggesting that anyone except himself bears the blame for his failure to take steps to locate and recruit potential staff members who might have been available to work for his paper. Under the circumstances, his allegation that the defendants prevented him from obtaining a staff must be rejected.

In addition to showing that plaintiff neglected the important task of obtaining a staff for his newspaper, the defendants

have shown that plaintiff neglected a number of other important activities necessary to the success of his paper such as promoting circulation, covering local news, and selling advertising. Plaintiff does not disagree with the statements by defendants' experts that all of these activities are necessary for the prosperity of a weekly newspaper, nor does he offer evidence contradicting much of the defendants' evidence of his neglect in these vital areas.

The plaintiff failed to promote the circulation of his paper in two major respects. First, although there were people available in Edgefield County to assist the plaintiff in maintaining his subscription list (Mrs. Mims Tr. at p. 13, lines 1-16; Reece Tr. at p. 33, lines, 4-12; Laird aff. at Para. 3;

McLean aff. at Para 3), the plaintiff allowed his subscription records to fall into disarray and become, in his own words, "obsolete." (Mims 3/28 Tr. at p. 142, lines 14-25;1 pp. 154-158; 5/16 Tr. at p. 38, lines 19-22). People who contacted the plaintiff and requested to receive the paper and to be billed for it, as well as those who had paid for subscriptions, had difficulty receiving the paper despite repeated efforts on their part (Rainsford aff. at Para.5, Knox aff. at Paras. 1-5; Timmerman aff. at Paras 2,3; H. Booraem aff. at Para. 5). Some people who had not paid for the paper continued to receive it, even though others who had paid did not receive the paper. (Mims 5/16 Tr. at p. 61, lines 18-19, pp. 64-70). Although a circulation consultant had agreed to

assist the plaintiff in rebuilding his paper circulation once the effect of the boycott had passed, the plaintiff never contacted the consultant for assistance. (Mims 3/28 Tr. at p. 34, line 16 to p. 37, line 6).

Second, the plaintiff failed to make any significant attempt to sell his paper through racks or at retail stores. Although the plaintiff once sold his papers from five racks, he abandoned those efforts when he encountered problems with theft and vandalism. (Mims aff. att Para. 1b). For the last several years The Edgefield Advertiser has been available for direct purchase at only one location in Edgefield County, its office. (Mims 5/16 Tr. at p. 94, lines 12-20; Aull aff. at Para. 4; Reece Tr. at p. 31, lines 7-24). By abondoning circulation

through newspaper racks and direct single paper sales, the plaintiff gave up a substantial part of his potential circulation. Stephen Jackson, the plaintiff's proposed expert, obtained from 400 to 500 of his 1,000 to 1,300 circulation in McCormick County through rack sales and other direct sales of his paper. (S. Jackson Tr. at p. 16, lines 2-8). Most of the increased circulation of the defendants'paper, The Citizen News, since it began in 1982 has been in sales from racks placed throughout Edgefield County. (Aull aff. at Para 4). The plaintiff does not dispute the statement of defendants' expert that normally 50% of the circulation of a weekly newspaper is attributable to papaers sold in this way. Sweatt aff. at Para. 9).

Mr. Mims cannot blame the defendants for his failure to attempt to promote the circulation of his paper. In his despoition he conceded that he had failed to attempt to distribute his paper more widely because he knew that his "newspaper could not achieve that level of news value readership interest to attract people to read it." (Mims 5/16 Tr. at p. 94, lines 24-25).

Nor can plaintiff blame the defendants for the lack of news value in his newspaper. Instead of attempting to cover the local news as best he could, plaintiff chose to fill his newspaper with political commentary and to turn it into a political "voice" rather than a community newspaper. (See Mims 3/28 Tr. at p. 8, lines 15-20; Sweatt aff. at Para. 13; and newspapers attached to

defendants' motion for summary judgment as Exhibit GG). Nowhere does the plaintiff dispute the statement of defendants' expert that, because of its lack of local news, The Edgefield Advertiser would not have attracted significant circulation or advertisers even if it had faced no competition at all. (Sweatt aff. at Para. 13).

Plaintiff concedes that he did not regularly read the other papers published in Edgefield County. (Mims 5/16 Tr. at p. 28, lines 11-25). Plaintiff's failure to read other newspapers is in direct contrast with the practices of his proposed expert, Stephen Jackson, who testified that he is careful to read a number of community newspapers, "to see what news they might have directly" or "indirectly" about his community. (S.

Jackson Tr. at p. 24, line 18 to p. 25, line 9). The plaintiff's decision to emphasize political commentary in his paper rather than local news also contrasts with the assertion of plaintiff's proposed expert, Stephen Jackson, that everything on his front page "should have some relationship to McCormick County" where Jackson's paper is published. (Jackson Tr. at p. 27, line 22 to p. 28, lin3 2). During his deposition, Jackson stated that much of the local news in his paper came to him with little effort on his part. (Jackson Tr. at p. 23, line 23 to p. 27, line 21;1 see McCormick Messemger, 5//30/85 edition attached to defendants' memorandum in support of summary judgment as Exhibit HH). The plaintiff has failed to explain why he could not have adopted the same

technique as his proposed expert and provided more local news in his paper in order to make it more of a success.

The plaintiff similarly neglected ad solicitation. The plaintiff does not dispute the opinion of the defendanats' experts that a weekly newspaper must constantly maintain contacts with and solicit potential advertisers. (Sweatt aff. Para. 10;p Montgomery aff. Para. 13). Yet the plaintiff concedes that in the years prior to this lawsuit he had essentially abondoned any significant effort to sell advertising. (Mims 3/28 Tr. at p. 67, line 24 to p. 699, line 20; 5/16 Tr. at p. 80, line 17 to p. 81, line 3. See also Friar Tr. at p. 20, lines 10-18). Mims testified that he did not actively seek ads because he did not consider it "honorable" to attempt to

sell an ad in his paper when its circulation was so low. (Mims 3/28 Tr. at p. 68, line 15 to p. 69, linee 2). He was also reluctant to approach businesses he had sued in a previous lawsuit. (Mims 3/28 Tr. at p. 67, line 24 to p. 68, line 8).

The plaintiff does not dispute key portions of the affidavits of two significant advertisers in the Edgefield area, Mr. Homer Jackson and Mr. Calliham, who state that until recently they had not been asked to advertise in The Advertiser and would lhave been glad to consider advertising had they been contacted earlier. (Jackson aff. at Para. 3; Calliham aff. at Paras. 2 and 3). Plaintiff attempted to obtain Calliham's advertising only by doing business with him (W. W. Mims aff. at

Para 4a). Plaintiff attempts to relate inadmissible heresay reports by his wife that while shopping she had contnacted unidentified personnel in Mr. Jackson's store as to advertising in the plaintiff's paper. (W. W. Mims aff. at p. 11). Even when viewed in the light most favorable to the plaintiff, the evidence indicates that The Edgefield Advertiser's ad solicitation efforts consisted, at most, of casual contacts by the plaintiff's wife, while shopping, with clerks and other people who may have had no responsibility for advertising. (Mrs. Mims Tr. at p. 10, lines 4-14). The plaintiff has shown no evidence that the defendants did anything to prevent him from actively soliciting advertising for his newspaper.

In view of the great volume of

uncontradicted evidence that the failure of the plaintiff's paper is due to the lasting effects of a boycott, in which the defendants were not involved, as well as the plaintiff's own neglect of the important tasks of recruiting staff, soliciting advertising, building circulation, and covering local news, it is difficult to understand how the plaintiff can contend seriously that the defendants are responsible for the failure of his paper. The plaintiff's claim of injury is analogous to the type of claim which the Supreme Court expressly rejected in the Brunswick case. The defendants, therefore, are entitled to summary judgment on the plaintiff's claims because he has failed to offer any significant probative evidence of the requisite antitrust injury.

B. Product Market

Proof of the relevant product market is also essential to each of the plaintiff's antitrust claims as well as to his UTPA claim which incorporates the antitrust claims. See United States v. E. I. DuPont, 353 U.S. 586, 593, 77S.Ct. 872, 877 (1957) (proof of relevant market essential to S. 7 Clayton Act violation); Satellite Television & Associated Resources, Inc. v. Continental Cablevision of Virginia, 714 F.2d 351, 355, 358 (4th Cir. 1983)) (plaintiff must prove product market in action under S1 and S2 of Sherman Act); RCM Supply Co. v. Hunter Douglas, Inc., 686 F.2dd 1074, 1076 (4th Cir. 1982) ("To establish an actionable attempt to create a monopoly...the market must be delineated with respect to the relevant product");

Acme Precision Products v. American Alloys Corp., 484 F.2dd 1237, 1240 (8th Cir. 1973) (proof of relevant market "prerequisite" for S 2 Sherman Act violation).

The relevant product market must include all the alternative products from which a consumer may choose to serve a certain purpose, i.e., all the reasonable interchangeable products. Stearns v. Genrad, Inc., 752 F.2d 942, 946 (4th Cir. 1984); Sattellite Television & Associated Resources Inc. V. Continental Cablevision of Virginia, 714 F. 2dd 351, 356 (4th Cir. 1984); Sales and Advertising Promotion v. Donrey Inc., 598 F.Supp. 538 (N. D. Okla. 1984). The plaintiff in this case alleges that weekly newspapers are the only relevant products, yet he has failed to substantiate his allegation

in the face of the defendants' evidence to the contrary.

The defendants have submitted numerous portions of depositions and affidavits which show that the plaintiff is wrong to suggest that weekly newspapaers are a separate market or submarket. The affidavit of defendants' expert Mr. Sweatt, shows that "total market coverage services..., radio stations, daily newspapers, billboards, shopper publications, utility companies...and other companies" which offer various ways orf getting messages to the public are reasonable interchangeable with weekly newspapers. (Sweatt's aff. at Para.8). The affidavit of Reid Montgomery, general secretary and manager of the South Carolina Press Association points out that newspapers must be "competitive

price-wise" with "radio, direct mail, television, [and] total market coverage." The affidavits of defendants Rainsford and Luther Aull show that ECC, Inc.'s newspaper, The Citizen News, must be price competitive with radio, television, cable television, a shopper entitled "I Wanta", internal direct mail, and total market coverage services like ADVO which compete with The Citizen News in Edgefield County. Affidavits from Mike Casey (station manager of station WJES in Johnston, South Carolina), Sam Cothran (publisher of The Aiken Standard), Emily Bull (former publisher of The County Press) and homer Jackson (owner of Jackson Brothers Meats and Groceries in Edgefield) show that there is significant competition in Edgefield County among radio, direct mail, television, five-day

a week newspapers, daily newspapers, and weekly newspapers (Casey aff. at Para 3; Cothran aff. at Para. 6; Bull aff. at Para.7; Jackson aff. at Para 4).

The plaintiff does not deny that there are many alternatives to weekly newspapers or that ECC, Inc's paper, The Citizen News, competes with those alternatives. In response to the evidence submitted by the defendants, the plaintiff simply contends that his newspaper is "better able to compete with" the alternatives to weekly newspapers. (W. W. Mims aff. at Para.3). In his deposition, Mr. Mims conceded that some of his potential advertising customers have substituted direct mail advertising, billboards and other types of communication for ads in his weekly

paper. (Mims 3/28 Tr. p.67, line 24 to p. 68, line 8; p. 81, line 17 to p. 82, line 24; p. 270, lines 9-19). The plaintiff's proposed expert, Mr. Stephen Jackson, also concedes in his deposition that the Ingles grocery store in his community, as well as nearby stores like Roses and Sky City, use direct mail to reach people in his area and do not advertise in his weekly newspaper. (S. Jackson Tr. p. 29, line 8 to p. 30, line 22).

Although Stephen Jackson asserts that the grocery stores in his area, McCormick County, do not advertise in "nearby metropolitan dailies," he does not specify what newspapers he considers to be "nearby metropolitan dailies." Nor does Jackson deny the statement by Mr. Homer Jackson of Jackson Brothers Meats

and Groceries in Edgefield County that his Edgefield grocery store advertises in The Augusta Chronicle, a daily paper, as well as other papers or that Homer Jackson, an Edgefield grocer, considers direct mail, radio and television as substitutes for weekly newspaper advertising. (See Homer Jackson aff. at Pars. 4 and 5). Stephen Jackson states that legal advertising must be done in newspapers with circulation in a particular area, but he does not suggest that weekly newspapers are the only papers available for legal advertising or that legal advertising is a significant part of the revenue of any newspaper. He asserts that classified ads in weekly newspapers may in some circumstances be cheaper than ads in a daily regional paper or radio or television, but he does

not assert that weekly newspaper classified ads are cheaper than those in a shopper publication like "I Wanta" or a five-day a week paper like The Aiken Standard or cable television. Nor does Mr. Stephen Jackson attempt to suggest that weekly newspapers are free to price their classified ads without regard to the prices of similar ads on radio and television or in daily regional papers.

The plaintiff has not offered any evidence to refute the defendants' evidence that direct mail, shopper publications, billboards, and newspapers other than "regional metropolitan dailies" are interchangeable with weekly newspapers for most purposes. Nor does the plaintiff attempt to refute the evidence submitted by the defendants which suggest that there is cross

elasticity of demand among weekly papers, direct mail, shoppers, billboards, and newspapers published more than once a week, yet not considered regional metropolitan dailies. In fact, the plaintiff has submitted no substantial evidence as to the degree of interchangeability or cross-elasticity of demand between weekly newspapers and any of the alternatives. Therefore, these alternative media must be included in the same product market with weekly newspapers. See Stearns v. Genarad, Inc., 752 F.2d 942, 946 (4th Cir. 1984); Satellite Television & Associated Resources Inc. v. Continental Cablevision of Virginia Inc., 714 F.2d 351, 355-356 (4th Cir. 1980); Sales and Advertising Promotion v. Donrey, Inc., 598 F..Supp. 538, 547 (N.D. Okla. 1984).

The plaintiff challenges the interchangeability of radio and television only in regard to classified ads and legal advertising. (See S. Jackson aff.). Therefore, at least for all purposes except legal and classified advertising, radio and television as well must be considered as part of the product market. And there is no evidence that legal and/or classified advertising constitutes a significant portion of the revenues of weekly newspapers or any of the other media which carry them. Similarly, plaintiff challenges the inclusion of papers, which Stephen Jackson classifies "metropolitan dailies" only in connection with grocery ads and classified advertising. Even if the plaintiff's evidence were given the greatest possible weight, metropolitan

dailies would be included in the market with weekly papers for every purpose except possibly for grocery and classified advertising.

Even when viewed most favorably to the plaintiff, the plaintiff's evidence simply does not sufficiently define weekly newspapers or any other product as the relevant product market. Without any significant probative evidence as to the relevant product market, the plaintiff's antitrust and unfair trade practices claims cannot succeed. Satellite Television & Associated Resources Inc. v. Continental Cablevision of Virginia Inc., 714 F.2d 351, 357 (4th Cir. 1983) ("absence of market measure alone should have entitled [defedant] to judgment in its favor").

C. Substantial Lessening of Competition

Plaintiff's claims also fail because the plaintiff has provided no evidence as to the defendants' market share or evidence of any significant decrease in competition as a result of the challenged acquisitions. To prevail on his S. 7 Clayton Act and S.1 Sherman Act claims, the plaintiff must produce market share statistics or other evidence that the acquisitions have threatened competition in the relevant market. Domed Stadium Hote., Inc. v. Holiday Innns, Inc., 732 F.2.d 480, 492 (5th Cir. 1984), Terry's Floor Fashions, Inc. v. Burlington Industries, Inc., No.83-1687, slip op. at n. 10 (4th Cir., May 23, 1985). To prevail on his S. 2 Sherman Act claims, the plaintiff must show that the defendants' market share is great enough at least to create a dangerous

probability of monopolization. Stearns v. Genrad, Inc., 752 F. Supp. 942, 9947 (4th Cir. 1984), Domed, supra, at 490-491; Nifty Foods Corp. v. Great Atlantic and Pacific Tea Company, 614 F.2d 832, 841 (2ds Cir. 1980); White Bag v. International Paper Co., 579 F.2d 1384, 1387 (4th Cir. 1959). Because the plaintiff's UTPA claim incorporates the antitrust claim, the UTPA claim also requires proof that there has been some significant threat to competition.

The defendants have submitted much evidence showing that the defendants' newspaper faces a great deal of competition from a number of newspapers and other media in Edgefield County. As noted earlier, the record shows that shopper publications, direct mail, radio, television, cablevision, and billboards

compete with the numerous newspapers which circulate in Edgefield County. The defendants have pointed out that it is relataively easy for a newspaper to enter a new geographic market. In recent years The State newspaper has entered new markets with a weekly edition (McLean aff. at Para.6). The Augusta Chronicle has established a weekly section, the "Carolina Extra", which circulates in Edgefield County. (Skinner aff. at Para.7). Defendant Rainsford's affidavit shows that The Citizen News faces vigorous competition from all the other newspapers and other media that serve the county and has no hope of obtaining a market share which would enable it to exert any competitive control over prices or supply. (Rainsford aff. at Para.8). In fact, Rainsford worked to organize The

Citizen News so that out-of-county newspapers and other types of media would not completely prevail in competition over the newspapers published in Edgefield County (Rainsford aff. at Para.2).

The plaintiff does not offer any evidence as to the market share of any entity before or after the challenged acquisitions. The plaintiff does not attempt to refute the evidence submitted by the defendants. Instead, he acknowledges in his affidavit that The August Chronicle has extended its services to Edgefield County through the "Carolina Extra" and that "numerous other advertising media [are] on the increase." (W. W. Mims aff. at p. 15, Para 18a). There is no evidence contradicting the defendants' assertion that The Citizen

News faces competition from numerous newspapers and other media. There is no evidence indicating that The Citizen News hask obtained a significant share of any product market.

Plaintiff attempts to base his claims on the allegation that before the acquisitions, The Ridge Citizen held approximately 37% of the market, The Edgefield County News ,approximately 37%, The Edgefield County Press approximately 21%, and The Advertiser, approximately 5%, as opposed to 95% for The Citizen News and 5% for The Advertiser after the acquisitions. (Plaintiff's memorandum in opposition to summary judgment at 5). The plaintiff, however, has not provided any evidence supporting this contention.

The defendants have also submitted evidence showing that, despite any market share figures that the plaintiff might offer, the challenged acquisitions did not actually lessen competition. At lease two, if not all three, of the newspapers which sold assets to Ecc, Inc. were extremely weak financially and not in a positio to continue to offer significant competition. Emily Bull, the publisher of The Edgefield County Press, made it clear in her deposition that to the time of the sale of assets she had exhausted her financial resousrces, planned to leave town since she had separated from her husband, and was unable to continue to publish the paper much longer. (Bull Tr. at p.41, lines 110-18; p. 44, lines 7-10; Bull aff. at Para.8). Amelia Reece, publisher of The

Edgefield County News, was also forced to sell her paper for financial reasons. Her paper had caused her to go deeper and deeper in debt each year of its operation and had never made a profit. (Reece Tr. at p. 10, lines 1-5; p. 11, line 18; p. 12, line 11). The plaintiff does not offer any evidence suggesting that either of these two papers could have remained as a significant competitor. In fact, in his deposition Mr. Mims stated that these papers were destined to fail and leave him to dominate the town of Edgefield.[9]

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[9] The plaintiff conceded that in 1982 the County News and County Press "began to weaken and to give up the ghost". (Mims 3/28 Tr. at p. 111, lines 1-2). His complaint is that the acquisitions prevented "the decease of these two

newspapers" from eliminating the competition they offered him in the town of Edgefield. (Mims 3/28 Tr. at p. 111, lines 2-13).

Combining the assets of these two financially troubled papers with assets from The Ridge Citizen, therefore, did not eliminate any significant competition. As made clear by the Supreme Court in United States v. General Dynamics, 415 U.S. 486, 504-504, 94 S.Ct. 1186, 1197 (1974), the acquisition of a company too weak to offer significant competition does not lessen competition in violation of the antitrust laws. In the absence of any significant probative evidence that the challenged acquisitions provided the defendants a dangerously large market share or significantly

injured competition in the relevant market in some other way, the defendants are entitled to summary judgment.

D. Failing Company Defense

Under the "failing company" defense an otherwise illegal acquisition is permitted if it involves a failing business which has been unable in good faith to find an alaternate purchaser to keep the business going as a separate competitive factor in the market. Citizens Publishing Co. v. U. S., 394 U.S. 131, 138; 89 S.Ct. 927, 931 (1969); FTC v. Great Lakes Chemical Corp., 528 F. Supp. 84, 98 (M.D. Ill. 1981); United States v. Maryland and Virginia Milk Producers Association, 167 F. Supp. 799, 808 (D.D.C. 1958).

To establish the defense, the defendants have submitted affidavits and

deposition excerpts which show that both the County Press and the County News were in severe financial trouble prior to the sale of assets adn that the seller in each case had no alternative but to sell. (Reece Tr. at p. 10, lines 105;1 p. 11, line 18 to p. 12, line 11; Bull Tr. at p. 41, lines 11-17 and aff. at Para. 8). The evidence submitted also shows that each of the sellers had attempted in good faith, but unsuccessfully, to find alternate buyers to keep their papers going as separate concerns prior to selling to ECC, Inc. (Reece Tr. at p. 10, lines 8-16; p. 10, line 21 to p. 11, line 3; Bull Tr. at p. 41, line 11 to p. 42, line 21; Bull aff. at Para 9). In response to the defendants' submission, the plaintiff did not submit any evidence suggesting that either of the sellers had

any prospects of recovering financially. Instead, the plaintiff states in his affidavit that he would have purchased the County Press had he been given the opportunity to do so. (. W. W. Mims aff. at Para 3). The plaintiff suggests further in his memorandum, although without evidentiary support, that he would have acquired the County News as well. (Plaintiff's Memo in Opposition to Summary Judgment at 19).

The plaintiff's contention, however, even if it is accepted for the purposes of this motion, is insufficient to deprive the defendants of this defense. An acquisition by the plaintiff would have been the equivalent of the complete liguidation of these two papers and the end of any separate competitive influence their assets might have been capable of

asserting. An acquisition by the plaintiff would only have assisted him in obtaining what he considers his "natural monopoly" as the only paper published in the town of Edgefield. There is no evidence indicating that the sellers of these papers failed to locate nay prospective purchaser who would have maintained the newspapers as separate competitive factors. Nor is there any evidence indicating that an acquisitiion by the plaintiff would have been less detrimental to competition than the acquisitions which occcurred. Under these circumstances, there is nothing illegal about the acquisitions which combined assets of the County Press and the County News with those of The Ridge Citizen, a newspaper which had been losing money for some time. (Aull aff.

at Para 2). The defendants are entitled to summary judgment by virtue of the failing company defense.

II. Intentiional Interference With Contractual Relations Claim

The defendants are also entitled to summary judgment regarding the plaintiff's intentional interference with contractual relations claim. In connection with this claim, the plaintiff alleges that defendant Rainsford wrongly persuaded Sandra Friar, an employee of ECC, Inc., to honor her contract with ECC, Inc. rather than to leave ECC, Inc. and go to work with the Advertiser. To prevail on this claim the plaintiff must prove, among other things, that Mr. Rainsford had knowledge of a contract with the Advertiser and that he had no justification for interfering with it.

Todd v. South Carolina Farm Bureau Mutual Insurance Co., 321 SA.E.2d 602, 607 (S.C. App. 1984).

The defendants are entitled to summary judgment on this claim because the uncontradicted evidence shows that defendant Rainsford was justified in convincing Sandra Friar to honor her contract with ECC, Inc. and that Sandra Friar had never actually accepted a job with the Edgefield Advertiser in the first place. Sandra Friar testified in her deposition that she was under contract with ECC, Inc. and did not feel free to accept a job with the Edgefield Advertiser until she was released from that contract. (Friar Tr. at p. 13, lines 2-11). The plaintiff has supplied no evidence contradicting Ms. Sandra Friar's testimony. Nor has the plaintiff

attempted to dispute the well established law that a "defendant is...permitted to interfere with another's contractual relations to protect his own present existing economic interest, such as...a prior contract of his own..." Prosser and Keaton, On The Law of Torts, S 129 at 986 (5th Ed. 1984); Restatement (Second) Of Torts, S. 773 (1979); Morse v. Swank, Inc., 493 F.Supp. 110, 116-117 (S.D.N.Y. 1980); Barlow v. Brunswick Corp., 311 F.Supp. 209, 216 (E.D.Pa. 1970).[10]

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[10] Although the plaintiff contends that the covenant not to compete in Sandra Friar's contract was illegal, the plaintiff offers no evidence to support that contention. See plaintiff's Memorandum in Opposition to Summary Judgment at 20.

In addition, Sandra Friar's deposition makes it clear that, although she wished to take a job with the Edgefield Advertiser, she had not actually entered a contract to do so. Sandra Friar stated that she told the plaintiff that she "would have to approach Bettis [Rainsford] before she could agree to come to work for the Advertiser. (Friar Tr. at p. 12, line 17 to p. 13, line 11). She also stated that she did not feel free to accept the Advertiser's offer of employment without Mr. Rainsford's consent. (Friar Tr. at p. 13, lines 2-4). The plaintiff has offered no evidence contradicting Sandra Friar's statements.

By granting summary judgment in favor of defendants Rainsford and ECC, Inc., the Court has fully adjudicated all

claims by the plaintiff against those defendants in this case. [11]

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[11] The Court has denied plaintiff's motion to amend the complaint to add a new cause of actiion based on 42 U.S.C. SS 1983 and 1985. This motion was not made until well after the end of discovery in this case and shortly before tiral. In connection with the motion, plaintiff requested additional discovery into defendant Rainsford's relationship with all governmental entities since 1970. This additional discovery would have required a delay of the trial on the plaintiff's claims. Plaintiff offered no justification for plaintiff's delay in attempting to add this cause of action. To have granted the motion to amend almost immediately prior to the trial

would have unjustifiably prejudiced the defendants. The plaintiff had already received a prior continuance in this lawsuit.

Other claims remain, however. Defendants Aull, ECC, Inc., and Rainsford have asserted counterclaims again the plaintiff.

There is also evidence indicating that sanctions against the plaintiff under Rule 11 of the Federal Rules of Civil Procedure may be appropriate in this case. A letter filed by the plaintiff states that the plaintiff was advised by competent counsel not to undertake this lawsuit because there was no basis for a finding of damages. (Letter from plaintiff dated July 18, 1982 attached to plaintiff's memorandum in support of

motion to disqualify). Plaintiff also filed a motion to disqualify opposing counsel without any substantial basis for doing so. This Court has reserved judgment on the question of whether sanctions are appropriate against the plaintiff as a result of a motion to disqualify. Defendants Aull, Kalmia Press, Inc., Rainsford, and ECC, Inc. have each stated that they intend to request sanctions pursuant to Rule 11 at the appropriate time.

If the entry of final judgment on the claims asserted by the plaintiff against Rainsford and ECC, Inc. were delayed until after the final resolution of the counterclaims and the question of sanctions under Rule 11, a successful appeal by the plaintiff of the Court's order granting summary judgment would

result in two trials rather than one. The possibility of a second trial can be avoided by entering final judgment on the plaintiff's claims against ECC, Inc. and Rainsford pursuant to Rule 54(b) of the Federal Rules of Civil Procedure and deferring the tiral on the counterclaim and any consideration of Rule 11 sanctions. Then in the event that a trial on the plaintiff's claims becomes necessary there will be only one trial in this litigation, and the Court can consider sanctions in view of the whole record. This Court expressly determines that there is no just reason to delay the entry of final judgment against the plaintiff on his claims against defendants Rainsford and ECC, Inc., and pursuant to Rule 54(b), this Court expressly directs the entry of final

judgment against the plaintiff on those claims. Any further consideratiion of the question of sanctions pursuant to Rule 11 shall be deferred until there is no further possibility of a trial on the plaintiff's claims against defendants Rainsford and ECC, Inc. Any motions by the defendants for sanctions Pursuant to Rule 11 should not be filed until that time. There the Court concludes:

1. that summary judgment should be entered in favor of defendants Rainsford and Edgefield County Communications, Inc. on all the causes of actions asserted by the plaintiff against them, and

2. that there is no just reason to delay the entry of final judgment on the plaintiff's claims against defendants Rainsford and ECC, Inc. and final judgment under those claims should be

entered on those claims pursuant to Rule 54(b).

AND IT IS SO ORDERED.

G. Ross Anderson, Jr.
United States District
Judge

August 8th, 1985.